SUPREME COURT, U. S.

No. 73-1756

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

RUTH E. BIDDLE, *Administratrix, Petitioner*

v.

JOHN S. BOWSER, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE Court of Appeals ~~SUPREME COURT~~ OF OHIO, Montgomery County

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v.

JOHN S. BOWSER, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Ruth E. Biddle prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Ohio, entered in the Appeal of this case, said Appeal being from the Court of Appeals for Montgomery County, Ohio, designated in said Supreme Court of Ohio as number 73-988, 1974 term, *Ruth E. Biddle, Administratrix, Appellant v. John S. Bowser, Appellee.*

1(a). OPINIONS BELOW

The Opinion of the Court of Appeals for Montgomery County, Ohio, in this case, is not officially reported, as of this date. The case is designated as *Ruth E. Biddle, Administratrix of the Estate of John W. Priser, Plaintiff—Appellant v. John S. Bowser, Defendant—Appellee,* Case. No. 4229, and is printed in the Appendix herein at Page 20. Upon Appeal to the Supreme Court of Ohio, the case was assigned number 73-988, for the February, 1974 term, under the title of *Ruth E. Biddle, Administratrix, Appel-*

lant v. John S. Bowser, Appellee, and the Supreme Court of Ohio, *sua sponte,* dismissed the Appeal from the Montgomery Court of Appeals, without opinion, said copy of the *sua sponte* dismissal is printed in the Appendix herein at Page 25. A Petition for Re-hearing was denied by the Supreme Court of Ohio, without opinion. A copy of the Notification to Appellant of the denial is printed in the Appendix herein at Page 26.

1(b). JURISDICTION

(i) The judgment of the Supreme Court of Ohio was entered on February 1, 1974 (the time of entry not being noted under Ohio practice).

(ii) The Petition for Re-hearing thereto filed on behalf of the Petitioner herein was denied on February 22, 1974.

(iii) The jurisdiction of this Court is invoked under the Act of June 25, 1948, c. 646 62 Stat. 929, 28 U.S.C.A. § 1257(3).

1(c). QUESTIONS PRESENTED FOR REVIEW

1. Is Section One of the Fourteenth Amendment to the Constitution of the United States violated when an Ohio trial Court grants a summary judgment, on the grounds of *Res Adjudicata,* when lawsuits filed prior to the adoption of the Revised Rules of Ohio Procedure (adopted July 1, 1970), seeking the same ultimate relief were based on different theories and different facts than the lawsuit filed since the adoption of the Revised Ohio Rules of Civil Procedure, *and* where a disputed issue of fact has never been litigated in a lawsuit filed since the adoption of Revised Ohio Rules of Civil Procedure?

2. Is Section One of the Fourteenth Amendment to the Constitution of the United States violated when, at the time of the entry of the summary judgment alluded to in the preceding question, the trial Court also enters a permanent injunction barring the petitioner from filing any further lawsuits against the respondent, *and* said trial

Court has not granted either a trial on the merits or an evidentiary hearing, to determine the propriety for issuing said permanent injunction?

3. Is Section One of the Fourteenth Amendment to the Constitution of the United States violated when the permanent injunction alluded to in the preceding question is grounded on the power of the Court of Equity of Ohio, under a "fact-pleading" system, actually required the multiple suits to narrow the issues involved in the litigation?

1(d). CONSTITUTIONAL PROVISION INVOLVED

This case involves the following italicized provisions taken from Section 1 of the Fourteenth Amendment to the Constitution of the United States:

> "... *No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; ... nor shall any State deprive any person of* life, liberty, or *property, without due process of law; ...*"

1(e). STATEMENT OF THE CASE
A. BACKGROUND PRIOR TO LITIGATION

On April 14, 1937, John Priser, a prosperous Mortgageless farmer who lived in Perry Township, Montgomery County, Ohio, purportedly granted a deed conveying to John C. Bowser the family farm owned by John Priser and containing 60 acres. This deed was never delivered from Mr. Priser to Mr. Bowser with the intent that the property described in the deed should be conveyed, and Mr. Priser at no time ever intended to relinquish complete control over the instrument.

In fact, on April 14, 1937, John Priser was an old man, who was neither physically nor mentally able to take care of himself or his affairs, and this fact was known to John Bowser. The purported deed was recorded in 1937, and in spite of this fact old John Priser continued to live on his farm until his death in November of 1944.

Now at the time of his death, John Priser had a daughter named Ruth Biddle, who was married and lived in another part of the country. Due to the distance involved, Ruth had not seen her father for many years. When Ruth came home to attend her father's funeral, she found that the Bowsers had taken over the Priser's family farm and were claiming title under the deed purportedly executed by John Priser in 1937.

Ever since the day of her father's funeral in November of the year 1944, when she first learned that his property had been taken from him, and up to this present moment Ruth Biddle has determinedly and steadily and persistently made efforts to obtain what she asserts and continues to assert is her own rightful property.

The Plaintiff-Appellant herein is the heir of John W. Priser, while the Defendant-Appellee is the heir and successor in interest of John C. Bowser.

B. LITIGATION COMMENCED IN 1944

On November 30, 1944, an action was commenced by this Plaintiff in the Montgomery County Court of Common Pleas, Case No. 95192, against John C. Bowser, for the purpose of attempting to recover title to and possession of the farm in question. The theory of the case in this action was that John Priser did not have the requisite mental capacity necessary to convey the property to John C. Bowser. The action was tried on its merits and a judgment was rendered in favor of Defendant, John C. Bowser. An appeal was taken to the Montgomery County Court of Appeals under Case No. 1899, and on April 15, 1951, the Court handed down a decision affirming the Court of Common Pleas. This Court of Appeals decision has never been journalized.

C. LITIGATION COMMENCED IN 1956

Then, on January 26, 1956, a second lawsuit was filed in the Montgomery County Court of Common Pleas, Case No.

109402, by the Plaintiff against the then surviving heirs of John C. Bowser, which sought the same ultimate relief, but on different grounds. The theory of the case in this action was constructive trust and forged deed. The defense of Res Judicata was overruled and this case went to trial on the merits. This case resulted in a trial verdict for the Defendants, and was appealed to the Montgomery County Court of Appeals under Case No. 2950 and affirmed. Appeal was then taken to the Supreme Court of Ohio, Case No. 41273, which denied certiorari on December 13, 1967. Appeal was then taken to the Supreme Court of these United States, Case No. 159, October Term, 1968, which dismissed the appeal, and this was journalized in June, 1969.

D. LITIGATION COMMENCED IN 1970

On April 30, 1970, a third action was filed in which Plaintiff sought the same ultimate relief, but on grounds different from those advanced in the first two actions. This action was also filed in the Montgomery County Court of Common Pleas and the theory of the case in this action was non-delivery of the questioned deed. Defendant filed a demurrer to Plaintiff's Petition, and the Court, treating the demurrer as a Motion to Dismiss, sustained the same and dismissed the action on July 29, 1970, on the grounds that it was apparent from the face of the Petition that the statute of limitations had expired. The decision of the Court was thereafter journalized on August 20, 1970, and an appeal was taken therefrom. On the 18th of June, 1971, the Court of Appeals for Montgomery County, Ohio, Case No. 3676, affirmed the decision of the trial Court, and the Opinion was journalized on August 6, 1971. Appeal was taken to the Supreme Court of Ohio, Case No. 71-260, where the Motion to Certify was overruled. Journalization was made on December 1, 1971.

The thrust of the Court of Appeal's opinion in this third action indicated that the defense of statute of limitations was valid because the Plaintiff had failed to allege in her Petition the filing and pendency of the two prior lawsuits;

which allegation were necessary to defeat the statute of limitations defense.

E. LITIGATION COMMENCED IN 1972

Accordingly, the Plaintiff stopped the appeal process, and on January 20, 1972, filed a fourth action in accordance with the criticisms contained in the Court of Appeals opinion in the third case. The Plaintiff sought the same ultimate relief and, as in the third action, the theory of the case was non-delivery of the alleged deed. In her Complaint, the Plantiff alleged the three prior lawsuits in order to comply with the Court of Appeals decision by showing that the statute of limitations had not expired.

The Defendant filed a Cross-Complaint alleging the Plaintiff was engaging in vexatious litigation and praying for a permanent injunction restraining the Plaintiff from filing any further lawsuits seeking the same ultimate relief.

The Defendant filed a motion for summary judgment. The Court ruled:

1. Plaintiff's Complaint should be dismissed because the decision in the third lawsuit was Res Judicata to this lawsuit.
2. Defendant's Cross-Complaint should be granted and a permanent injunction was issued and served personally on the Plaintiff barring her from filing any further lawsuits against the Defendant seeking the same ultimate relief. (Note: No trial or evidentiary hearing was ever held to determine the propriety of hearing the injunction.)

An appeal to the Ohio Supreme Court followed which was dismissed sue sponte, and a Petition for Re-Hearing was denied. Petitioner therefore has filed this Petition for a Writ of Certiorari to the Supreme Court of the State of Ohio.

1(f). FEDERAL QUESTION RAISED

A. In the Court of Appeals of Montgomery County, Ohio

(a) On March 13, 1973, the Common Pleas Court for Montgomery County, Ohio, handed down its decision, order

and final summary judgment, said judgment including a permanent injunction against the Petitioner, from pursuing any further litigation against the Respondent. The Federal question was first raised by the Petitioner in her Assignments of Error and Brief of Appellant, filed with the Court of Appeals of Montgomery County, Ohio, on April 16, 1973, pages 21, 22 and 23 of said document filed by Appellant contained the applicable references to the Federal question, and are included in the Appendix, in pages 41, 42 and 43.

A Refinement of the Federal question was raised in Appellant's Reply Brief and pamphlet of authority, subsequently filed with the Court of Appeals of Montgomery County, Ohio, on May 29, 1973. That portion of the document filed by the Appellant containing the reference to the Federal question is as follows:

> "The Ohio Rules of Civil Procedure was patterned upon the Federal Rules of Civil Procedure, and ORCP56 is virtually identical to FRCP56. *Moore's Federal Practice* (2 Ed), 2243, Paragraph 56.12, states in part as follows:
>
> > *'—provided that care has been taken by the district court in determining that the party against whom summary judgment is rendered has had a full and fair opportunity to meet the proposition that there is no genuine issue of material fact to be tried, and that the party for whom summary judgment is rendered is entitled thereto as a matter of law.'*
>
> "The exercise of that 'care' is set forth, in easy to understand language, by the Supreme Court of the United States in the case of *Fountain v. Filson* (1949), 336 U.S. 681, as follows:
>
> > *'—that another issue not argued or sought in the complaint, except as a prayer for "other relief" gave the plaintiff grounds for recovery.' and, '—where it appears that there is no dispute as to any fact material to the issue being litigated. For here the order was made on appeal on a new issue as to which the opposite party had no opportunity to present a defense before the trial court.'*

> *'—Summary judgment may be given, under Rule 56, only if there is no disptue as to any material fact.'*
>
> "To deprive one party of an opportunity to dispute the facts material to a claim, after the issue has been brought into dispute by the opposing party, is reversable error."

In Appellant's application for reconsideration and supporting memorandum, filed September 24, 1973, in the Court of Appeals of Montgomery County, Ohio, a reference is made to the question of vexatious litigation, on pages 3 and 4 of said document, and is as follows:

> "This case is not vexatious litigation, nor is there present a multiplicity of suits, there was no full trial on the merits as required by OCR 65.
>
> The Ohio Civil Rule 65, requires that a full trial on the merits be held before a permanent injunction will be granted.
>
> There is no multiplicity of suits, since the plaintiff has filed only one law suit at a time, and in the same place each time, in accordance with existing law.
>
> The most diligent search of Ohio law failed to reveal an interpretation of vexatious litigation, however, those interpretations that were found failed to include the instant case at bar. Instead, the following definitions take the plaintiff-appellant's case out of that category;
>
> *'A proceeding instituted maliciously and without probable cause.'*
> *Paramount Pictures, ets v. Blumenthal,* New York, Vol. 11, New York Supplement (2d) p. 722.
>
> *'A kind of malicious prosecution, differing principally because based on a civil action.' —'It is when the party bringing the proceeding is not acting bona fide, and merely wishes to annoy his adversary; or when it is not calculated to lead to any practical result.'*
> *Calvo v. Bardolatta,* 112 Conn, p. 396. Vol. 157, Atlantic Reports, p. 311.
>
> *'A vexatious proceeding is one filed without reasonable or probable cause or excuse.'*
> *Gardner v. Insurance Co.,* Vol. 232 Missouri Ap-

peals, p. 1101; Vol. 115, New York Sup. Reports (2d) pages 4 and 7.

'The suit must be filed not only without probable cause, but it must also be filed with malice.' Bridgeport Hydraulic Co. v. Pearson, 139 Connecticut Reports, page 186.

The Settlement of genuine grievances in open Court, even the settlement of differences of opinion in some cases, is one of the precious freedoms guaranteed by our State and Federal Constitutions."

The Montgomery County Court of Appeals, in its opinion rendered July 30, 1973, treats the issues involved as follows, commencing on page 3, and continuing to page 5 of its opinion;

"In the present appeal, the appellant alleges two assignments of error: (1) that the trial court erred in sustaining the motion for a summary judgment and (2) that the trial court erred in granting the injunction.

With reference to the first assignment of error, and with a view to substance rather than form, we find no allegation in the pleading filed in the present case which will remove it from the grasp of the previous judgments entered between the same parties or their successors in interest. The 'new case' filed by the plaintiff is based essentially upon the allegation that the grantor did not intend to deliver the deed, but this claim would necessarily involve the same controlling facts which were directly in issue in the previous actions.

In *Ross v. Stricker,* 153 Ohio St. 153, the syllabus provides as follows:

'A point or fact which was actually and directly in issue in an action or in a branch of the same action and was there passed upon and finally determined by a court of competent jurisdiction may not be drawn in question in any future action or litigation between the same parties or their privies, whether the cause of action in the two actions or branches of the same action by identical or different.'

"To the same effect, see *Schimke v. Earley,* 173 Ohio St. 521; *Quinn, Auditor v. The State,* ex rel Leroy, 118 Ohio St. 48; *Hixson v. Ogg,* 53 Ohio St. 361.

In the case of *Norwood v. McDonald,* 142 Ohio St. 299, the Supreme Court established some guidelines which may be considered in determining the applicability of the doctrine of res judicata:

> 'To determine whether a second action is based upon the same cause of action as that litigated in a former action claimed to be a bar to the second action under the doctrine of res judicata, the primary tests are the identity or investitive facts creating the right of action in each case; the identity of the evidence necessary to sustain each action; and the accrual of the alleged rights of action at the same time.'

Here, all of the foregoing tests have been met, and the pleading itself, when construed most favorably to the plaintiff, does not provide for the factual exploration of any new avenues. See *Biddle v. Bowser,* Montgomery County Court of Appeals, Case No. 3676, June 18, 1971.

Once again applicable to the record in this case is the observation made on June 18, 1971, when the court, speaking through Judge Crawford, said:

> 'While there were slight variations in these cases, they all pursued the same objective, touching the same subject matter, and affecting the same parties or their successors in interest. Plaintiff has not only had her day in court, she has had months and years. As important as is the opportunity of a litigant to be heard in trial and upon appeal, thereafter it is equally important that a controversy should be brought to a close.'

In our opinion, the record supports the action taken by the Court of Common Pleas, and the first assignment or error will be overruled.

"The second assignment of error challenges the authority of the trial court to enjoin the commencement of further litigation directed to the issues which have been approached from various angles since 1944.

As a general rule, a court of equity may properly intervene to prevent vexatious and expensive litigation. 42 American Jurisprudence 2d 987, Section 206; 29 Ohio Jurisprudence 2d 348, Section 132. The rule was specifically applied in *Laursen v. Lowe,* 50 Ohio App. 103, where the court said:

> 'A court of equity may enjoin, as useless and vexatious litigation, the prosecuting of a suit already begun, and the bringing, by and against the same parties, of future similar suits, where the issues raised by said suit already begun have been adjudicated, and the purpose of that suit is not to litigate any new question but merely to harass and vex the defendant therein; and this is so although the defendant could defeat the suit already begun and the future suits, if any, by the plea in each one of res judicata: for under such circumstances equity does not regard that course as affording the defendant a complete and adequate remedy.'

In the *Laursen* case, the court, quoted from *2 Story on Equity Jurisprudence* (14th Ed.), 543, Section 1173 as follows:

> 'If suits might be perpetually brought to litigate the same questions between the same parties or their privies as often as either should choose, it is obvious that remedial justice would soon become a mere mockery; for the termination of one suit would only become the signal for the institution of a new one, and the expenses might become ruinous to all the parties. The obvious ground of the jurisdiction of courts of equity in cases of this sort is to suppress useless litigation and to prevent multiplicity of suits.'

The prayer for injunctive relief invoked the discretionary power of the trial court, and the record fails to disclose an abuse of discretion. Hence, the second assignment of error is overruled.

B. In the Supreme Court of Ohio

The Supreme Court of Ohio did not pass specifically on the Federal questions raised by Petitioner. However, it did dismiss generally with the following language, the contingents raised by Petitioner which were not specifically discussed in the Opinion:

> "This cause, here on appeal as of right from the Court of Appeals for Montgomery County, was heard in the manner prescribed by law, and no motion to dismiss such appeal having been filed, the Court sua sponte

dismisses the appeal for reasons that no substantial constitutional question exists herein." (Appendix at page 25.)

1(g). REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW IS A DEPARTURE FROM MINIMAL STANDARDS OF PROCEDURAL DUE PROCESS AND SERVES NO LEGITIMATE STATE INTEREST.

When the new Ohio Rules of Civil Procedure came into effect on July 1, 1970, the pleading system changed from a "fact" pleading system to a system kown as a "rule" or "notice" pleading system. *Baldwin's Ohio Revised Code Annotated,* Fourth Edition, 1972 Replacement, Rules of Civil Procedure, Staff Notes, Pp 28, 29. The revised Ohio system of pleading is modelled very closely after the Federal Rules of Civil Procedure, and, consequently, the Ohio Code annotations and the intermediate courts of appeal are paying an increasing amount of attention to the U.S. Supreme Court decisions construing the Federal Rules of Civil Procedure, *Id,* at 30; *Washington County Farm Assoc. v. The B&O R.R. Corp.,* 31 Ohio App. 2d 84 (1972), citing *Conley v. Gibson,* 355 U.S. 41, 45 (1957). The Court in *Washington County Farm Assoc. v. B&O R.R. Corp., supra,* at 94, recognizes that "it is difficult to discard old concepts, but do it we must. Rule 1B places emphasis on liberal construction rather than technical interpretation."

The old concepts of technical interpretation of pleadings are well illustrated in *Norwood v. McDonald et al,* 142 Ohio St. 299, 52 N.E. 2d 67 (1943), during the heyday of the technical pleading era in the State of Ohio. In a case involving an election of remedies by the plaintiff, where the plaintiff chose a mutually exclusive remedy and lost in the first case, he was met with a plea of *res adjudicata* when he filed a second suit, utilizing the other remedy, which plea the Supreme Court of Ohio rules was inappropriate, holding, at 52 N.E. 2d 75, "If a plaintiff obtains a judgment granting him one of two alternative or mutually

exclusive remedies for the assertion of the same right or the same relief, he is precluded from thereafter maintaining an action for the other remedy . . . But, where a judgment is for the defendant in a suit based upon one of two mutually exclusive remedies, plaintiff is not precluded from thereafter maintaining an action based on the other remedy."

The delaying effect of the technical rules of Ohio civil pleading, as they existed at that time is further illustrated by another quotation from the Court's holding in *Norwood v. McDonald*:

> "Since there were two entirely separate and distinct causes of action involved in this litigation, the plaintiff was not required to prosecute them in one action. On the contrary, the plaintiff was entitled to pursue what appeared to him to be his most advantageous remedy, and, even though he was unsuccessful in that, he had a right, as shown in the course of this opinion, to pursue another less advantageous but nonetheless valid and appropriate remedy which he is pursuing in this action." *Id,* at 75.

In the light of this history of these pleading techniques, the treatment of the petitioner's cases by the Courts of the State of Ohio seems particularly harsh. The litigation commenced before 1970 utilized the techniques outlined by the Court in *Norwood, supra*, and when, after 1970, she pursued litigation founded on a theory that was not utilized in any prior litigation, the reaction of the Ohio Courts, in effect, is "Plaintiff has not only had her day in Court, she has had months and years. As important as is the opportunity of a litigant to be heard in trial and upon appeal, thereafter it is equally important that a controversy should be brought to a close." *Biddle v. Bowser*, Montgomery County, Ohio, Court of Appeals, Case No. 3676, June 18, 1972, p. 6 (Appendix page 23). Not only was the long course of the litigation not the fault of the petitioner, the Ohio Rules of Civil Procedure, prior to 1970, under the "fact pleading" system, required this approach to complicated litigation.

Petitioner contends that no legitimate state interest is to be served by the handling of cases, such as petitioner's by the Ohio Courts, in this fashion. *Henry v. Mississippi*, 379 U.S. 44, 13 L ed 2d 408, 85 S. Ct. 564, reh. den. 380 U.S. 926, 13 L ed 2d 813, 85 S. Ct. 878 (1965). Thus, litigation that could or would be considered vexatious under the new pleading system, the "notice-pleading" system cannot be so considered under the "fact-pleading" system, and was not so considered by the Ohio Court, but was considered the normal way of proceeding. *Norwood v. McDonald, supra.* Certainly, it is desirable for litigation or controversies to be brought to a close by the court system of the State of Ohio. It is quite another matter, however, when a litigant is forever prevented from pursuing her remedy by a permanent injunction enforced by the state court system, when during the entire course of the litigation, she followed, slavishly and painstakingly, the technical rules of procedure. A state interest is being served by clearing the dockets of one case in this manner, but the litigant's procedural rights have been seriously abridged, due in large measure, to the change of the theory of Ohio civil procedure, and the unfamiliarity of the Ohio Courts with the liberality with which the new rules were intended to be interpreted, indeed, have been interpreted, by both other state and Federal courts. *Washington County Farm Assoc. v. B&O R.R. Corp., supra.* This unfamiliarity of the Ohio Courts has created a patchwork pattern of appellate decisions regarding the trial courts' use of the summary judgment. See *Butcher v. Pollard*, 32 Ohio App. 2d 1, 288 N.E. 2d 204 (1972), where trial court was reversed; *Duke v. Sanymetal Products Co., Inc.*, 31 Ohio App. 2d 78, 286 N.E. 2d 324 (1972), where the trial court was reversed; *Landrum v. Dombey*, 30 Ohio App. 2d 200, 284 N.E. 2d 183 (1971), where the trial court was reversed; *Reynoldsburg Motor Sales, Inc. v. City of Columbus*, 32 Ohio App. 2d 271, 289 N.E. 2d 909 (1972), where the trial court was affirmed.

The revised Rules of Civil Procedure of Ohio, effective

July 1, 1970, will affect every civil action filed throughout that state for years to come. Based on experience with the rules in other jurisdictions, this Court has held ". . . that all pleadings shall be so construed as to do substantial justice . . ." *Conley v. Gibson, supra,* at p. 48. Petitioner contends that the Ohio rules, like the Federal rules, should "reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." Id, at 48; *Maty v. Grasselli Chemical Co.,* 303 U.S. 197, 82 L ed 745, 58 S. Ct. 507.

Finally, the correctness of the decision below, as far as it interprets the extent to which the local Ohio law permits the review of an asserted Federal right, is open to serious question. In *Henry v. Mississippi, supra,* at page 412, this Court states ". . . local rules do not necessarily prevail . . . Whether the right was denied or not given due recognition by the [state court] . . . is a question as to which the plaintiffs are entitled to invoke our judgment."

1(h). CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of the State of Ohio.

Respectfully submitted,

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APPENDIX A

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY OHIO

Ruth E. Biddle, Administratrix of the Esate of John W. Priser, deceased. Plaintiff, *vs.* John S. Bowser, Defendant.	Case No. 72-137 **DECISION, ORDER AND FINAL SUMMARY JUDGMENT** January 18, 1973

Love, J.

The issue involved in this case concerns a certain parcel of real estate conveyed by deed from John W. Priser to John C. Bowser on April 14, 1937. Since that time, four suits, including the one now under consideration, have been filed praying for that conveyance to be set aside. However, for the purpose of this decision, the Court will consider only the suit filed on April 30, 1970, captioned *Biddle, Administratrix v. Bowser,* Case No. 135376 in the Court of Common Pleas of Montgomery County, Ohio.

That petition alleged among other facts that:

> "3. Plaintiff further says that said John W. Priser, at no time from the execution of said deed until his death, ever intended to relinquish complete control over said instrument; or said premises; that said deed at no time was ever delivered from John W. Priser to John C. Bowser with the intent that the property described therein should be conveyed;"

A demurrer to that petition was sustained on August 8, 1970 which was affirmed by the Court of Appeals on August 6, 1971.

The defendant now argues that the issue of non-delivery, which is again alleged in the instant case, has never been litigated and therefore res judicata does not preclude recovery as prayed for.

The Court considers the present action as being in the nature of a collateral attack on the previously cited case. Any issues that were actually litigated or could have been litigated in that case cannot be re-litigated in this Court by collateral attack. *Covington & C. Bridge Co. v. Sargent,* 27 Ohio St. 233. The appeal steps were exhausted in all of the cases previously initiated by the plaintiff and this Court may not now allow those same issues to be re-litigated.

Furthermore, the defendant's counterclaim for injunctive relief ought to be granted for it is a well-known principle of equity that the "Chancellor" may invoke the powers of equity to avoid multiplicity of suits.

It is the order of this Court, therefore, that a summary judgment should be and hereby is granted on the ground of res judicata.

This Decision, Order and Final Summary Judgment was served upon all counsel as indicated below by ordinary mail on the 13th day of January, 1973.

RODNEY M. LOVE,
Judge

OTTERBEIN CREAGER
Attorney for plaintiff
706 American Building,
Dayton, Ohio 45402

MASON DOUGLASS
Attorney for defendant
1005 Gem City Savings
Building,
Dayton, Ohio 45402

APPENDIX B

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO

Ruth E. Biddle, Administratrix of the Estate of John W. Priser, deceased Plaintiff, *vs.* John S. Bowser Defendant.	Case. No. 72-137 **ENTRY**

The Court having rendered a Decision and Order and Final Judgment on January 18, 1973, in this cause against the Plaintiff and for the Defendant, as upon and for Summary Judgment; and

The Court therein found that the Defendant's Cross Complaint for injunctive relief ought to be granted, does now enter a permanent injuction against the Plaintiff or any person in privity with or claiming through her, permanently enjoining the filing of any further suit as to the title of the Defendant, his heirs or assigness, to the real estate involved in this litigation; and

The Court does direct an Order that a permanent injunction issue against the Plaintiff barring her or any assignee or claimant or person claiming under her from filing any further suits in the premise herein established of record now and heretofore. This injunction does not relate to any appeal from the judgment of the Court herein and/or this injunction.

The Court further directs and orders that a certified copy of this Entry be forthwith served upon the said Plaintiff, Ruth E. Biddle, together with the Order of Injunction aforesaid, all through the Office of the Clerk of the Common Pleas Court of Montgomery County, Ohio, and the Office of the Sheriff of Montgomery County, Ohio.

This entry is now admitted by the Court to be filed nunc pro tunc in the office of the Clerk of Common Pleas Court so that it may be embraced in the appeal being made to the Court of Appeals by the Plaintiff.

Counsel herein agreeing to that affect.

The exceptions of the Plaintiff are herein noted. Costs assessed against the Plaintiff.

RODNEY M. LOVE,
Judge

OTTERBEIN CREAGER
Attorney for Plaintiff

MASON DOUGLASS
JOHN F. EDWARDS
Attorneys for Defendant

APPENDIX C

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

Ruth E. Biddle, Administratrix of the Estate of John W. Priser, Deceased
Plaintiff-Appellant

vs.

John S. Bowser
Defendant-Appelle

Case No. 4229
OPINION

Rendered on the 30th day of July 1973

OTTERBEIN CREAGER
Attorney at Law
705 American Building
Dayton, Ohio 45402
Attorney for Plaintiff-Appellant

MASON DOUGLAS
Attorney at Law
1005 Gem City Bldg.
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and
JOHN EDWARDS
Attorney at Law
1324 Knott Bldg.
Dayton, Ohio 45402
Attorneys for Defendant-Appellee

Kerns, J.

This appeal is from a summary judgment entered by the Court of Common Pleas of Montgomery County on January 18, 1973, but the factual background of the contro-

versy reached a litigous state of development more than a generation ago.

On April 14, 1937, a deed was executed by John W. Priser conveying certain real estate to John C. Bowser. The plaintiff, Ruth E. Biddle, appellant herein, is an heir of John W. Priser, and the defendant, John S. Bowser, appellee herein, is the heir and successor in interest of John C. Bowser.

On November 30, 1944, the plaintiff commenced an action in the Court of Common Pleas of Montgomery County to recover title to and possession of the real estate. The cause of action was tried on its merits, and a judgment was rendered in favor of John C. Bowser. This judgment was affirmed by the Court of Appeals on April 15, 1951.

On April 26, 1956, another action was filed in the Court of Common Pleas of Montgomery County which also sought to set aside the deed, but this case resulted in a trial verdict for the defendants. The judgment was affirmed by the Montgomery County Court of Appeals. The motion to certify the cause to the Supreme Court of Ohio was denied on December 13, 1967, and a subsequent motion to the Supreme Court of the United States was denied in June, 1969.

The third action was filed on April 30, 1970, wherein the plaintiff sought a declaration of the various rights of the parties. The defendant demurred to the petition, and the court, in treating the demurrer as a motion to dismiss, sustained the same and dismissed the action on July 29, 1970. This judgment was affirmed by the Court of Appeals, and a subsequent motion to certify the case to the Supreme Court of Ohio was overruled.

On January 20, 1972, the plaintiff commenced the present action claiming the same ultimate relief sought in the previous actions filed in the Court of Common Pleas. In a decision rendered on January 18, 1973, the trial court applied the doctrine of res judicata and sustained the motion for a summary judgment. Additionally, the trial

court granted injunctive relief to the defendant to prevent any further litigation of the issues before the court.

In the present appeal, the appellant alleges two assignments of error: (1) that the trial court erred in sustaining the motion for a summary judgment and (2) that the trial court erred in granting the injunction.

With reference to the first assignment of error, and with a view to substance rather than form, we find no allegations in the pleading filed in the present case which will remove it from the grasp of the previous judgments entered between the same parties or their successors in interest. The "new case" filed by the plaintiff is based essentially upon the allegation that the grantor did not intend to deliver the deed, but this claim would necessarily involve the same controlling facts which were directly in issue in the previous claim.

In *Ross v. Stricker,* 153 Ohio St. 153, the syllabus provides as follows:

> "A point or fact which was actually and directly in issue in an action or in a branch of the same action and was there passed upon and finally determined by a court of competent jurisdiction may not be drawn in question in any future action or litigation between the same parties or their privies, whether the cause of action in the two actions or branches of the same action be identical or different."

To the same effect, see *Schimke v. Earley,* 173 Ohio Ct. 521; *Quinn, Auditor v. The State,* ex rel Leroy, 118 Ohio St. 48; *Hixson v. Ogg,* 53 Ohio St. 361.

In the case of *Norwood v. McDonald,* 142 Ohio St. 299, the Supreme Court established some guidelines which may be considered in determining the applicability of the doctrine of res judicata:

> "To determine whether a second action is based upon the same cause of action as that litigated in a former action claimed to be a bar to the second action under the doctrine of res judicata, the primary tests are the identity of investitive facts creating the right of action in each case; the identity of the evidence necessary

to sustain each action; and the accrual of the alleged rights of action at the same time."

Here, all of the foregoing tests have been met, and the pleading itself, when construed most favorably to the plaintiff, does not provide for the factual exploration of any new avenues. See *Biddle v. Bowser,* Montgomery County Court of Appeals, Case No. 3676, June 18, 1971.

Once again applicable to the record in this case is the observation made on June 18, 1971, when the court, speaking through Judge Crawford, said:

> "While there were slight variations in these cases, they all pursued the same objective, touching the same subject matter, and affecting the same parties or their successors in interest. Plaintiff has not only had her day in court, she has had months and years. As important as is the opportunity of a litigant to be heard in trial and upon appeal, thereafter it is equally important that a controversy should be brought to a close."

In our opinion, the record supports the action taken by the Court of Common Pleas, and the first assignment of error will be overruled.

The second assignment of error challenges the authority of the trial court to enjoin the commencement of further litigation directed to the issues which have been approached from various angles since 1944.

As a general rule, a court of equity may properly intervene to prevent vexatious and expensive litigation. 42 American Jurisprudence 2d 987, Section 206; 29 Ohio Jurisprudence 2d 348, Section 132. The rule was specifically applied in *Laursen v. Lowe,* 50 Ohio App. 103, where the court said:

> "A court of equity may enjoin, as useless and vexatious litigation, the prosecution of a suit already begun, and the bringing, by and against the same parties, of future similar suits, where the issues raised by said suit already begun have been adjudicated, and the purpose of that suit is not to litigate any new question but merely to harass and vex the defendant therein; and this is so although the defendant could defeat the suit already begun and the future suits, if

> any, by the plea in each one of res judicata: for under such circumstances equity does not regard that course as affording the defendant a complete and adequate remedy."

In the Laursen case, the court quoted from *2 Story on Equity Jurisprudence* (14th Ed.), 543, Section 1173 as follows:

> "If suits might be perpetually brought to litigate the same questions between the same parties or their privies as often as either should choose, it is obvious that remedial justice would soon become a mere mockery; for the termination of one suit would only become the signal for the institution of a new one, and the expenses might become ruinous to all the parties. The obvious ground of the jurisdiction of courts of equity in cases of this sort is to suppress useless litigation and to prevent multiplicity of suits."

The prayer for injunctive relief invoked the discretionary power of the trial court, and the record fails to disclose an abuse of discretion. Hence, the second assignment of error is overruled.

After further examination of the record, and upon further comparison of the various claims initiated from time to time by the plaintiff, we are convinced that no prejudicial error intervened in the Court of Common Pleas.

The judgment will therefore be affirmed.

CRAWFORD, P. J. and SHERER, J. concur.

APPENDIX D

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO, *City of Columbus.*	1967 *TERM* *To wit:* February 1, 1974
Ruth E. Biddle, Admrx., Appellant, *vs.* John S. Bowser, Appellee.	*No.* 73-988 **APPEAL FROM THE COURT OF APPEALS** *for* MONTGOMERY *County*

This cause, here on appeal as of right from the Court of Appeals for MONTGOMERY *County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial question exists herein.*

It is further order that a copy of this entry be certified to the Clerk of the Court of Appeals for MONTGOMERY *County for entry.*

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court

this . . . . . day of . . . . . 19 . . .

. . . . . *Clerk*

. . . . . *Deputy*

APPENDIX E

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
City of Columbus.

1974 *TERM*
To wit: February 22, 1974

Ruth E. Biddle, Admx.,
Appellant,

vs.

John S. Bowser,
Appellee.

No. 73-988
REHEARING

It is ordered by the court that rehearing in this case is denied.

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No. ....., Page .....

IN WITNESS WHEREOF, I have hereunder subscribed my name and affixed the seal of the Supreme Court this 22nd *day of* February, 1974.

THOMAS L. STARTZMAN, *Clerk.*

By ..... Deputy.

APPENDIX F

The statute of limitations involved in this case §2305.04, Revised Code, which provides in part as follows:

> "An action to recover the title to or possession of real property shall be brought within twenty-one years after the cause thereof accrued. . . ."

GENERAL RULES OF PLEADING

Rule 8

GENERAL RULES OF PLEADING

(A) Claims for relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

(B) Defenses; form of denials. A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, he may make his denials as specific denials of designated averments or paragraphs, or he may generally deny all the averments except such designated averments or paragraphs as he expressly admits; but, when he does so intend to controvert all its averments, including averments of the

grounds upon which the court's jurisdiction depends, he may do so by general denial subject to the obligations set forth in Rule 11.

(C) Affirmative defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, want of consideration for a negotiable instrument, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court, if justice so requires, shall treat the pleading as if there had been a proper designation.

(D) Effect of failure to deny. Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

(E) Pleading to be concise and direct; consistency.

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or equitable grounds. All statements shall be made subject to the obligations set forth in Rule 11.

(F) Construction of pleadings. All pleadings shall be so construed as to do substantial justice.

(G) Pleadings shall not be read or submitted. Pleadings shall not be read or submitted to the jury, except insofar as a pleading or portion thereof is used in evidence.

(H) Disclosure of minority or incompetency. Every pleading or motion made by or on behalf of a minor or an incompetent shall set forth such fact unless the fact of minority or incompetency has been disclosed in a prior pleading or motion in the same action or proceeding.

Rule 12

DEFENSES AND OBJECTIONS—WHEN AND HOW PRESENTED—BY PLEADING OR MOTION—MOTION FOR JUDGMENT ON THE PLEADINGS

(A) When answer presented.

(1) Generally. The defendant shall serve his answer within twenty-eight days after service of the summons and complaint upon him; if service of notice has been made by publication, he shall serve his answer within twenty-eight days after the completion of service by publication.

(2) Other responses and motions. A party served with a pleading stating a cross-claim against him shall serve an answer thereto within twenty-eight days after the service upon him. The plaintiff shall serve his reply to a counter-claim in the answer within twenty-eight days after service of the answer or, if a reply is ordered by the court, within twenty-eight days after service of the order, unless the order otherwise directs. The service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court: (a) if the court denies the motion, a responsive pleading, delayed because of service of the motion, shall be served within fourteen days after notice of the court's action; (b) if the court grants the motion, a responsive pleading, delayed

because of service of the motion, shall be served within fourteen days after service of the pleading which complies with the court's order.

(B) How presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19 or Rule 19.1. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. When a motion to dismiss for failure to state a claim upon which relief can be granted presents matters outside the pleading and such matters are not excluded by the court, the motion shall be treated as a motion for summary judgment and disposed of as provided in Rule 56. Provided however, that the court shall consider only such matters outside the pleadings as are specifically enumerated in Rule 56. All parties shall be given reasonable opportunity to present all materials made pertinent to such a motion by Rule 56.

(C) Motion for judgment on the pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings.

(D) Preliminary hearings. The defenses specifically enumerated (1) to (7) in subdivision (B) of this rule, whether made in a pleading or by motion, and the motion

for judgment mentioned in subdivision (C) of this rule shall be heard and determined before trial on application of any party.

(E) Motion for definite statement. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within fourteen days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(F) Motion to strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within twenty-eight days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient claim or defense or any redundant, immaterial, impertinent, or scandalous matter.

(G) Consolidation of defenses and objections. A party who makes a motion under this rule must join with it the other motions herein provided for and then available to him. If a party makes a motion under this rule and does not include therein all defenses and objections then available to him which this rule permits to be raised by motion, he shall not thereafter assert by motion or responsive pleading, any of the defenses or objections so omitted, except as provided in subdivision (H) of this rule.

(H) Waiver of defenses and objections. A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or if he has made no motion, by responsive pleading or an amendment thereof made as a matter of course under Rule 15(A), except (1)

the defense of failure to state a claim upon which relief can be granted, the defense of failure to join an indispensable party, the defense of lack of jurisdiction of the subject matter, and the objection of failure to state a legal defense to a claim, may be made by a later pleading, if one is permitted, by motion for judgment on the pleadings or at the trial on the merits; and except (2) whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

Rule 15

AMENDED AND SUPPLEMENTAL PLEADINGS

(A) Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within twenty-eight days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party. Leave of court shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within fourteen days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(B) Amendments to conform to the evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment. Failure to amend as provided herein does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within

the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

(C) Relation back to amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

The delivery or mailing of process to this state, a municipal corporation or other governmental agency, or the responsible officer of any of the foregoing, subject to service of process under Rule 4 through Rule 4.6, satisfies the requirements of clauses (1) and (2) of the preceding paragraph if the above entities or officers thereof would have been proper defendants upon the original pleading. Such entities or officers thereof or both may be brought into the action as defendants.

(D) Amendments where name of party unknown. When the plaintiff does not know the name of a defendant, that defendant may be designated in a pleading or proceeding by any name and description. When the name is discovered, the pleading or proceeding must be amended accordingly. The plaintiff, in such case, must aver in the complaint the

fact that he could not discover the name. The summons must contain the words "name unknown," and a copy thereof must be served personally upon the defendant.

(E) Supplemental pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

Rule 54

JUDGMENTS; COSTS

(A) Definition; form. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a referee or the record of prior proceedings.

(B) Judgment upon multiple claims or involving multiple parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim or third-party claim, or when multiple parties are involved, the court may enter final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay. In the absence of such determination, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(C) Demand for judgment. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled; however, a demand for judgment which seeks a judgment for money shall limit the claimant to the sum claimed in the demand unless he amends his demand not later than seven days before the commencement of the trial. Additional service of process is not necessary upon such amendment.

(D) Costs. Except when express provision therefor is made either in a statute or in these rules, costs shall be allowed to the prevailing party unless the court otherwise directs.

Rule 56

SUMMARY JUDGMENT

(A) For party seeking affirmative relief. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of the time permitted under these rules for a responsive motion or pleading by the adverse party, or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. However, if the action has been set for pretrial, a motion for summary judgment may be made only with leave of court. If the action has been set for trial, a motion for summary judgment may be made only with the consent of all parties.

(B) For defending party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may at any time, move with or without supporting affidavits for a summary judgment in

his favor as to all or any part thereof. However, if the action has been set for pretrial, a motion for summary judgment may be made only with leave of court. If the action has been set for trial, a motion for summary judgment may be made only with the consent of all parties.

(C) Motion and proceedings thereon. The motion shall be served at least fourteen days before the time fixed for hearing. The adverse party prior to the day of hearing may serve and file opposing affidavits. Summary judgment shall be rendered forthwith if the pleading, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated int his rule. A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only therefrom, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in his favor. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(D) Case not fully adjudicated upon motion. If on motion under this rule summary judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court in deciding the motion, shall examine the evidence or stipulation properly before it, and shall if practicable, ascertain what material facts exist without controversy and what material facts are actually and in good faith controverted. The court shall thereupon make an order on its journal specifying the facts that are without controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such

further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(E) Form of affidavits; further testimony; defense required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(F) When affidavits are unavailable. Should it appear from the affidavits of a party opposing the motion for summary judgment that he cannot for sufficient reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or discovery to be had or may make such other order as is just.

(G) Affidavits made in bad faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Rule 65

INJUNCTIONS

(A) Temporary restraining order; notice; hearing; duration. A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give notice and the reasons supporting his claim that notice should not be required. The verification of such affidavit or verified complaint shall be upon the affiant's own knowledge, information or belief; and so far as upon information and belief, shall state that he believes this information to be true. Every temporary restraining order granted without notice shall be filed forthwith in the clerk's office; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed fourteen days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for one like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be set forth in the order of extension. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence over all matters except older matters of the same character. When the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On two days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice

to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification, and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

(B) Peliminary injuction.

(1) Notice. No preliminary injunction shall be issued without reasonable notice to the adverse party. The application for preliminary injunction may be included in the complaint or may be made by motion.

(2) Consolidation of hearing with trial on merits. Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subdivision (B)(2) shall be so construed and applied as to save to the parties any rights they may have to trial by jury.

(C) Security. No temporary restraining order or preliminary injunction is operative until the party obtaining it gives a bond executed by sufficient surety, approved by the clerk of the court granting the order or injunction, in an amount fixed by the court or judge allowing it, to secure to the party enjoined the damages he may sustain, if it is finally decided that the order or injunction should not have been granted.

The party obtaining the order or injunction may deposit, in lieu of such bond, with the clerk of the court granting the order or injunction, currency, cashier's check, certified check or negotiable government bonds in the amount fixed by the court.

Before judgment, upon reasonable notice to the party who obtained an injunction, a party enjoined may move

the court for additional security. If the original security is found to be insufficient, the court may vacate the injunction unless, in reasonable time, sufficient security is provided.

No security shall be required of this state or political subdivision, or agency of either, or of any officer thereof acting in his representative capacity.

A surety upon a bond or undertaking under this rule submits himself to the jurisdiction of the court and irrevocably appoints the clerk of the court as his agent upon whom any papers affecting his liability on the bond or undertaking may be served. His liability as well as the liability of the party obtaining the order or injunction may be enforced by the court without jury on motion without the necessity for an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court who shall forthwith mail copies to the persons giving the security if their addresses are known.

(D) Form and scope of restraining order or injunction. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding upon the parties to the action, their officers, agents, servants, employees, attorneys and those persons in active concert or participation with them who receive actual notice of the order whether by personal service or otherwise.

(E) Service of temporary restraining orders and injunctions. Restraining orders which are granted ex parte shall be served in the manner provided for service of process under Rule 4 through Rule 4.3 and Rule 4.6; or in manner directed by order of the court. If the restraining order is granted upon a pleading or motion accompanying a pleading the order may be served with the process and pleading. When service is made pursuant to Rule 4 through Rule 4.3

and Rule 4.6 the sheriff or the person designated by order of the court shall forthwith make his return.

Restraining orders or injunctions which are granted with notice may be served in the manner provided under Rule 4 through Rule 4.3 and Rule 4.6, in the manner provided in Rule 5 or in the manner designated by order of the court. When service is made pursuant to Rule 4 through Rule 4.3 and Rule 4.6 the sheriff or the person designated by order of the court shall forthwith make his return.

APPENDIX G

Pages 21, 22 and 23, Petitioner's Assignments of Error and Brief of Appellant.

II. THE TRIAL COURT ERRED IN GRANTING THE DEFENDANT A PERMANENT INJUNCTION WITHOUT DUE COURSE OF LAW.

The course of equity flows two ways, and facts and argument set forth heretofore holds preponderantly to that theory. Without being opprobrious, the plaintiff contends that injunction will not lie in the instant situation or under the conditions herein enumerated.

The complaint is not subject to a motion to dismiss if there is some set of facts that would support a claim. If the complaint is vague or ambiguous and the defending party cannot frame a responsive pleading, it will be subject to a motion for a definite statement. Civil Rule 12(E). The evidence properly admitted at trial, rather than the pleadings, establishes the relief to which a party is entitled. The Civil Rules make certain that there will be an opportunity for the pleader to bring the facts of *every possible* claim before the Court. Civil Rule 12(B) and Civil Rule 56. Previous to the Civil Rules parties were required to elect, to their detriment, between inconsistent causes of action, the Civil Rules rectify this situation. This is in consonance with our Constitution.

Article I, Section 16, of the Constitution of the State of Ohio, states;

> *"All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay. Suits may be brought against the state, in such courts and in such manner, as may be provided by law." (Adopted September 3, 1912.)*

Amendment XIV, Section I, of the Constitution of the United States, states;

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within it's jurisdiction the equal protection of the laws." (Adopted in 1868.)

The defendant's cross-complaint bases his whole claim for relief on the premise that the plaintiff has activated, promoted, and continued litigation for the same purpose, over the same subject matter, and now pursues the same objective, based on the same law.

The question of title to the questioned property has never been heard, nor adjudicated. The grantor did not have a good title, nor can anyone have good title, until the question is settled in Court, and the proportionment of equity determined and allowed. *Aequitas sequitur legem.*

The defendant and the trial Court, base their pleadings, motions, and/or determinations, on the basis of former determinations which have no bearing upon the instant case at issue. It is the most basic of the most fundamental legal principles, that, neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, even within the jurisdiction where evidence differs, nor of any matter incidentally cognisable, nor of any matter to be inferred by argument from the judgment. For a judgment is final only for it's own proper purpose and no further. In this respect, therefore, the defendant's briefs have misled the trial Court into the belief that the decision of the Court of Appeals, in Case No. 3676, set down on June 18, 1971, was complete, final and incontrovertible. This in effect would render the Court of Appeals decision, as to in it's self, granting the injunctive relief, which was neither sought nor registered therein by the defendant in the special demurrer. Since defendant did not seek or request injunctive relief, for the trial Court

to now render such an interpretation to the decision of the Court of Appeals is unfounded, improper and reversible error.

Civil Rule 65 separates injunctions into three categories; (1) Temporary, (2) Preliminary, and (3) Permanent. The permanent injunction is issued only after a full trial on the merits. The trial Court has closed upon the plaintiff without such a trial, and in the presence of positive evidence that such a trial was necessary.

The trial Court has abrogated the plaintiff's rights, under the Constitution of Ohio, and the Constitution of the United States.

No. 73-1756

FILED
NOV 8 1974
MICHAEL ROBAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

RUTH E. BIDDLE, *Administratrix, Petitioner*

v.

JOHN S. BOWSER, *Respondent*

PETITION FOR REHEARING ON A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

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PETITION FOR REHEARING ON A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

To the Honorable Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Comes now the petitioner and presents this petition for a rehearing on her Writ of Certiorari to the Court of Appeals for Montgomery County, Ohio, filed in this case.

JURISDICTION

The Petition for Writ of Certiorari was filed on May 23, 1974, and denied by this Court on October 15, 1974. This Petition for rehearing is filed within twenty-five days from October 15, 1974, in accordance with Rules 58 of this Court.

REASONS FOR PETITION FOR REHEARING

In applying for this rehearing, your petitioner reiterates each and every ground set forth in the original petition, and further suggests to the Court the matters hereinafter discussed.

On April 24, 1974, United States Supreme Court decided the case of *Dave Pernell, Petitioner* v. *Southall Realty,* US , 40 L Ed 2d 198, 94 S Ct. The instant case and the *Pernell* case can be distinguished on the basis that the Seventh Amendment right to a jury trial was considered in *Pernell,* whereas the respondent in this case alleges a violation of her procedural due process rights, under the Fourteenth Amendment and cannot allege denial of the jury trial, because she did not ask for it below. However, the significance of *Pernell v. Southall Realty* to *Biddle* v. *Bowser* is that, in the *Pernell* case the Court is, for the first time, considering the constitutionality of a law of the District of Columbia, touching on civil procedure in the local court. Similarly in the case of *Biddle* v. *Bowser,* the Supreme Court of the United States is asked to consider the constitutionality of the interpretation of the new Ohio rules of civil procedure, as interpreted by the highest court of that state.

The United States Supreme Court, in *Pernell* v. *Southall Realty* analyzed, in detail, those forms of action which came within the purview of the Seventh Amendment: "We recently had occasion to note that while 'the thrust of the Amendment was to preserve the right to jury trial as it existed in 1791, it has long been settled that the right extends beyond the common-law forms of action recognized at that time.' *Curtis* v. *Loether,* US , , 39 L Ed 2d 260, 94 S Ct 1005 (1974). The phrase 'suits at common law' includes not only suits

> 'which the *common* law recognized among its old and settled proceedings, but suits in which *legal* rights

were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies administered.... In a just sense, the amendment then may be considered to embrace all suits which are not of equity and admiralty jurisdiction, whatever might be the peculiar form which they may assume to settle legal rights.' *Parsons* v. *Bedford*, 3 Pet 433, 447, 7 L Ed 732 (1830) emphasis in original).

Whether or not a close equivalent to § 16-1501 existed in England in 1791 is irrelevent for Seventh Amendment purposes, for that Amendment requires trial by jury in actions unheard of at common law, provided that the action involves rights and remedies of the sort traditionally enforced in an action at law, rather than in an action at equity or admiralty. See *Curtis* v. *Loether, supra,* US, at , 39 L Ed 2d 260." *Pernell* v. *Southall Realty*, infra, 40 L Ed 2d, at 208-209. Mr. Justice Marshall, in further analyzing the District of Columbia statute drawn into question in the *Pernell* case, stated: "In contrast, § 16-1501 is not a criminal action intended to redress the use of force, but rather was designed as a general civil remedy to determine which of two parties has the better legal right to possession of real estate. And, in this respect, § 16-1501 is not limited, as was the 1864 Act, to landlord-tenant disputes, but has been held to encompass, for example, suits by a purchaser at a foreclosure sale to evict the former owner, *Glenn* v. *Mindell*, 74 A2d 835 (DC Mun App 1950); *Surratt* v. *Real Estate Exchange*, 76 A2d 587 (DC Mun App 1950); *Sayles* v. *Eden*, 144 A2d 895 (DC Mun App 1958), by the heir of property to evict the current occupant, *Mahoney* v. *Campbell*, 209 A2d 791 (DC Ct App 1965), and by a tenant in common seeking to share possession of the premises, *Bagby* v. *Honesty*, 149 A2d 786 (DC Mun App 1959)." *Pernell* v. *Southall Realty*, infra, 40 L Ed 2d, at 211.

Of course, in the trial of *Biddle* v. *Bowser*, in the Mont-

gomery County, Ohio Court of Common Pleas, the trial judge acted as both the trier of fact and the trier of law. The decision and entry by the trial court are listed as Appendices A and B, pages 16-19 of the Petition for a Writ of Certiorari, filed in the instant case. As noted, a final summary judgment and a permanent injunction were awarded to John S. Bowser, the defendant below and the respondent in this Court. This judgment and entry was made by the trial court, the Common Pleas Court of Montgomery County, Ohio, based on only the pleadings and affidavits attached thereto. No evidentiary hearing, of any type, was held by the trial court, prior to said election and entry.

Your petitioner is well aware of this Court's "reluctance to review decisions... involving matters peculiary local concern, absent a constitutional claim or a problem of general federal law of nationwide application." *Pernell* v. *Southall Realty*, infra, page 204. Petitioner contends, however, that her treatment at the hands of the Court of Common Pleas of Montgomery County, Ohio, falls within that exception of a "local law matter... where egregious error has been committed". *Pernell* v. *Southall Realty*, infra, page 205.

Petitioner contends that, by so acting, the Common Pleas Court of Montgomery County, Ohio, nullified her rights in direct contradiction to the United States Constitution, by not only granting a summary judgment to the defendants, but permanently enjoining her, forever, to proceed under the revised rules of civil procedure of the State of Ohio without an evidentiary hearing or trial on the merits. In summary, your petitioner contends that the present posture of her case creates a substantial and controlling circumstance entitling her to a rehearing of the judgment of this Court denying her Petition for Writ of Certiorari. *Sanitary Refrigerator Company* v. *Winters*, 280 U.S. 3, 34, footnote 1, 50 S. Ct. 9,10 (1929).

CONCLUSION

For the foregoing reasons, your petitioner respectfully urges that a rehearing be granted, that upon further consideration of the order of October 15, 1974, denying the Petition for Writ of Certiorari, be revoked, and that a writ of certiorari issue; or, in the alternative, that this Court remand this matter to the United States District Court, Dayton, Ohio, for an appropriate hearing on the permanent injunction entered by the Court of Common Pleas, Montgomery County, Ohio.

JOHN O. HARPER

I, John O. Harper, of counsel for the petitioner, Ruth Biddle, do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for the purpose of delay. Further, I hereby certify that the petition for rehearing is restricted to the grounds above specified.

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APPENDIX

§ 16-1501. DEFINITION; summons

When a person detains possession of real property without right, or after his right to possession has ceased, the Superior Court of the District of Columbia, on complaint under oath verified by the person aggrieved by the detention, or by his agent or attorney having knowledge of the facts, may issue a summons to the party complained of to appear and show cause why judgment should not be given against him for the restitution of possession. (Dec. 23, 1963, 77 Stat. 581, Pub. L. 88-241, § 1, eff. Jan. 1, 1964; July 29, 1970, Pub. L. 91-358, title I, § 145(g)(1), 84 Stat. 560.)